

Message Text

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PAGE 01 USBERL 00519 01 OF 02 181715Z
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R 181630Z FEB 77
FM USMISSION USBERLIN
TO AMEMBASSY BONN
INFO SECSTATE WASHDC 4069
AMEMBASSY BERLIN UNN
AMEMBASSY LONDON
AMEMBASSY MOSCOW
AMEMBASSY PARIS
USMISSION NATO

C O N F I D E N T I A L SECTION 1 OF 2 USBERLIN 0519

E O 11652: GDS
TAGS: PFOR, PGOV, WB, GW, UR
SUBJ: SOVIET PROTEST ON LORENZ KIDNAPPING PROSECUTION

REF: USBERLIN 350

SUMMARY: ALLIED MISSION HAVE AGREED (SUBJECT TO
A PROCEDURAL RESERVATION BY FRENCH) ON TEXT OF A RESPONSE
TO SOVIET PROTEST OF JANUARY 28 ON INVOLVEMENT OF
FEDERAL PROSECUTOR IN LORENZ KIDNAPPING TRAIL AND
OPERATION OF FEDERAL COURTS IN BERLIN. TEXT WHICH WE
ARE RECOMMENDING TO EMBASSIES IS LONG, BUT SOVIETS
ENGAGED IN MORE THAN USUAL AMOUNT OF DISINGENUOUS
ARGUMENTATION IN THIS PROTEST, AND WE FEEL IT WOULD
BE USEFUL TO REFUTE THEM IN DETAIL FROM TEXT OF QA
ITESELF. END SUMMARY.

1. FOLLOWING IS TEXT DEVELOPED BY ALLIED MISSIONS.

BEGIN TEXT: A. YOU MADE REFERENCE IN YOUR DECLARATION
OF 28 JANUARY TO A ROLE OF THE FEDERAL PROSECUTOR
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PAGE 02 USBERL 00519 01 OF 02 181715Z

AND THE FEDERAL COURTS IN THE INVESTIGATION OF INDIVIDUALS
SUSPECTED OF HAVING PARTICIPATED IN THE KIDNAPPING OF
HERR LORENZ AND TO THE RELEVANCE OF THE QUADRIpartite
AGREEMENT OF 3 SEPTEMBER 1971 TO THIS MATTER. I WOULD
WISH TO RECALL MY DECLARATION OF 6 AUGUST ON THIS SUB-
JECT IN RESPONSE TO A PREVIOUS SOVIET STATEMENT AND TO
MAKE MORE PRECISE IN THE NAME OF THE THREE POWERS THE

FOLLOWING:

B. YOU HAVE ASSERTED THAT ANNEX II OF THE QUAD-RIPARTITE AGREEMENT OF 3 SEPTEMBER 1971 STATES THAT "STATE BODIES OF THE FRG WILL NOT PERFORM CONSTITUTIONAL OR OFFICIAL ACTS IN THE WESTERN SECTORS OF BERLIN," AND THAT THE LETTER OF THE THREE AMBASSADORS TO THE FEDERAL CHANCELLOR CONCERNING THE INTERPRETATION OF ANNEX II STATES "QUITE CLEARLY THAT AMONG SUCH STATE BODIES OF THE FRG FORBIDDEN TO ENGAGE IN ANY ACTIVITIES IN THE WESTERN SECTORS ARE ALL FEDERAL COURTS." THE APPARENT PURPOSE OF THESE STATEMENTS IS TO IMPLY THAT ACTIVITIES IN BERLIN OF FEDERAL COURTS AND OF FEDERAL OFFICIALS SUCH AS THE FEDERAL PROSECUTOR ARE IN VIOLATION OF THE QUADRIPARTITE AGREEMENT OF 3 SEPTEMBER 1971.

C. ANNEX II OF THE QUADRIPARTITE AGREEMENT OF 3 SEPTEMBER 1971 SAYS THAT STATE BODIES OF THE FRG "WILL NOT PERFORM IN THE WESTERN SECTORS OF BERLIN CONSTITUTIONAL OR OFFICIAL ACTS WHICH CONTRADICT THE PROVISIONS OF PARAGRAPH 1," NAMELY THOSE PROVISIONS WHICH AFFIRM THAT "THE TIES BETWEEN THE WESTERN SECTORS OF BERLIN AND THE FEDERAL REPUBLIC OF GERMANY WILL BE MAINTAINED AND DEVELOPED, TAKING INTO ACCOUNT THAT THESE SECTORS CONTINUE NOT TO BE A CONSTITUENT PART OF THE FEDERAL REPUBLIC OF GERMANY AND NOT TO BE GOVERNED BY IT." THE LETTER OF THE THREE AMBASSADORS, WHICH IN PARAGRAPH E INCLUDES FEDERAL COURTS IN THE LIST OF "STATE BODIES," CONTAINS IN PARAGRAPH A THE CONFIDENTIAL

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PAGE 03 USBERL 00519 01 OF 02 181715Z

FOLLOWING DEFINITIVE INTERPRETATION: "THE PHRASE IN PARAGRAPH 2 OF ANNEX II OF THE QUADRIPARTITE AGREEMENT WHICH READ "...WILL NOT PERFORM IN THE WESTERN SECTORS OF BERLIN CONSTITUTIONAL OR OFFICIAL ACTS WHICH CONTRADICT THE PROVISIONS OF PARAGRAPH 1" SHALL BE INTERPRETED TO MEAN ACTS IN EXERCISE OF DIRECT STATE AUTHORITY OVER THE WESTERN SECTORS OF BERLIN."

D. JUDICIAL INVESTIGATIONS INTO CRIMINAL MATTERS IN BERLIN ARE CARRIED OUT BY AUTHORITIES ACTING UNDER POWERS CONFERRED ON THEM BY THE BERLIN LEGISLATURE AND IN CONFORMITY WITH ALLIED RIGHTS AND RESPONSIBILITIES. THIS IS ALSO THE SITUATION FOR PROSECUTIONS CARRIED OUT BY THESE AUTHORITIES, INCLUDING THE FEDERAL PROSECUTOR. SUCH ACTS DO NOT, THEREFORE, CONSTITUTE ACTS IN THE EXERCISE OF DIRECT STATE AUTHORITY IN THE SENSE OF ANNEX II OF THE QUADRIPARTITE AGREEMENT.

E. THE THREE POWERS WOULD NOTE THAT THE FEDERAL

PROSECUTOR IS NEITHER A MEMBER NOR AN ORGAN OF A
FEDERAL COURT. THE CRIMES CONCERNED IN THE PRESENT
CASE WOULD, IN CONFORMITY WITH THE LAWS IN FORCE IN
THE WESTERN SECTORS OF BERLIN, BE PROSECUTED BEFORE
THE BERLIN KAMMERGERICHT, WHICH IS NOT A FEDERAL COURT.

F. MY AUTHORITIES HAVE ASKED ME TO RECALL, HOWEVER,
THE STATEMENT MADE TO YOU ON 13 APRIL 1976 BY THE
CHAIRMAN POLAD IN CONNECTION WITH YOUR PROTEST OF 12
FEBRUARY 1976 ON A DECISION OF THE FEDERAL ADMINISTRATIVE
COURT. AS WAS EXPLAINED TO YOU AT THAT TIME, CERTAIN
FEDERAL COURTS WERE ESTABLISHED IN THE WESTERN SECTORS
OF BERLIN 25 YEARS AGO WITH ALLIED AUTHORIZATION.
THEIR ESTABLISHMENT HERE AND THEIR COMPETENCE FOR THE
WESTERN SECTORS OF THE CITY ARE LIKEWISE STIPULATED
IN THE LEGISLATIVE TEXTS THAT HAVE BEEN ADOPTED AS
BERLIN LEGISLATION. THEIR ACTIVITIES, LIKE THOSE OF
CONFIDENTIAL

CONFIDENTIAL

PAGE 04 USBERL 00519 01 OF 02 181715Z

OTHER FEDERAL INSTITUTIONS OR OF THE FEDERAL PROSECUTOR
IN THE WESTERN SECTORS, ARE PURSUANT TO POWERS
CONFERRED ON THEM BY THE BERLIN LEGISLATURE AND ARE
SUBJECT TO ALLIED RIGHTS AND RESPONSIBILITIES.
CONSEQUENTLY, THE POINT OF VIEW THAT SUCH ACTIVITIES
CONSTITUTE A VIOLATION OF THE QUADRIpartite AGREEMENT
OF 3 SEPTEMBER 1971 IS WITHOUT FOUNDATION. END TEXT.

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PAGE 01 USBERL 00519 02 OF 02 181734Z
ACTION EUR-12

INFO OCT-01 ISO-00 IO-13 NSA-01 SAJ-01 ACDA-07 OMB-01
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C O N F I D E N T I A L SECTION 2 OF 2 USBERLIN 0519

2. COMMENT: THIS IS, OFCOURSE AN UNUSUALLY LONG DRAFT RESPONSE. WE CONSIDERED, HOWEVER, AS NOTED IN REFTTEL, THAT SOVIETS HAD GONE BEYOND THEIR PREVIOUS POSITION ON FEDERAL PROSECUTOR TO ATTACK LEGALITY OF FEDERAL COURTS OPERATING IN BERLIN AND THAT WE OUGHT TO PRESENT OUR POSITION ON THIS POINT STRONGLY. WE ALSO NOTED THAT WHAT SOVIETS IN EFFECT HAD DONE WAS TO REVERT TO SEVERAL KEY POSITIONS THEY HELD AT OUTSET OF QA NEGOTIATIONS -- I.E., FEDERAL COURTS IN BERLIN ARE ILLEGAL; FEDERAL OFFICIALS SHOULD BE ABLE TO DO NOTHING IN BERLIN EXCEPT VISIT AS TOURISTS; THEIR ACTIVITIES SHOULD BE BARRED BY THE AGREEMENT -- AND THEN STATE BALDLY THAT THIS IS WHAT QA IN FACT SAYS. WE FELT THAT ALLIES SHOULD CALL SOVIETS ON THESE BLATANT MISSTATEMENTS OF QA, NOT ONLY BY RESTATING OUR THEORY OF INDIRECT VERSUS DIRECT STATE AUTHORITY, BUT BY CONTRASTING WHAT SOVIETS SAY QA SAYS WITH WHAT IS ACTUALLY IN THAT DOCUMENT.

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PAGE 02 USBERL 00519 02 OF 02 181734Z

3. BRITISH MISSION HAS CONCURRED WITH US ON BOTH NATURE OF SOVIET PROTEST AND DESIRABILITY OF PROVIDING A DETAILED REFUTATION. FRENCH MISSION HAS APPROVED TEXT BUT HAS NOTED THAT ITS AUTHORITIES HAVE NOT YET DECIDED WHETHER IT WOULD BE OPPORTUNE TO MAKE A FORMAL REPLY TO SOVIETS AT THIS TIME. FRENCH MISSION IS ACCORDINGLY REFERRING TEXT TO ITS EMBASSY WITH COMMENTARY THAT IT NEED NOT NECESSARILY BE USED IN PRESENT FORM BUT SHOULD BE CONSIDERED AS COLLECTION OF ARGUMENTS WHICH ALLIES COULD MAKE USE OF IN WHOLE OR IN PART WHENEVER THEY ELECT TO ADDRESS SOVIETS. DURING COURSE OF DISCUSSIONS IN TEXT, FRENCH MISSION SHOWED PARTICULAR INTEREST IN EMPHASIZING THAT ACTIONS OF FEDERAL PROSECUTORS ARE NOT ONLY SUBJECT TO ULTIMATE ALLIED SUPERVISORY RESPONSIBILITIES BUT THAT THEY ARE IN EFFECT "BERLINIZED" BY INTERPOSITION OF LEGISLATIVE ACTION OF BERLIN HOUSE OF REPRESENTATIVES IN ADOPTING LAWS PURSUANT TO WHICH FEDERAL PROSECUTOR ACTS IN BERLIN. FRENCH THUS TEND TO SEE PARAGRAPH D AS CORE OF DRAFT RESPONSE.

4. ALLIED MISSIONS HAVE ALSO AGREED TO SUGGEST THAT EMBASSIES MAY WISH TO EXPLORE WITH FRG IN BONN GROUP

POSSIBILITY THAT A MEMBER OF FEDERAL PROSECUTOR'S
BERLIN OFFICE BE PLACED FORMALLY IN CHARGE OF FEDERAL
PROSECUTOR'S ACTIVITIES AT PRESENT STAGE OF INVE-
STIGATION. CORRESPONDENCE WITH KARLSRUHE THEN COULD,
FOR OPTICAL PURPOSES, BE CHANNELLED THROUGH BERLIN
OFFICE. (ALLIES HAVE PREVIOUSLY MADE POINT THAT A
BERLIN-BASED MEMBER OF FEDERAL PROSECUTOR'S OFFICE
SHOULD BE FORMALLY IN CHARGE OF CASE WHEN AND IF IT
COMES TO COURT, BUT AT PRESENT INVESTIGATIVE
STAGE FEDERAL PROSECUTOR'S ACTIVITIES APPARENTLY ARE
STILL BEING HANDLED DIRECTLY FROM KARLSRUHE). WE
AGREED FURTHER, HOWEVER, THAT IF THIS POINT WAS RAISED
WITH FRG IT WOULD BE PRUDENT TO ADD CAVEAT THAT WE
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PAGE 03 USBERL 00519 02 OF 02 181734Z

WERE TALKING ONLY ABOUT LORENZ KIDNAPPING CASE, SPECIAL
SENSITIVITIES OF WHICH ARE KNOWN TO ALL. WE WOULD NOT
WISH TO BE MISUNDERSTOOD AS SUGGESTING THAT SUCH AN
OPTICAL DEVICE BE EMPLOYED BY FEDERAL PROSECUTOR FOR
GREAT MASS OF ROUTINE BERLIN-RELATED BUSINESS IN WHICH
HIS KARLSRUHE OFFICE IS INEVITABLY INVOLVED.

5. FINALLY, MISSIONS HAVE DISCUSSED WHETHER ALLIED
RESPONSE SHOULD BE IN WRITING. FRENCH HAVE SHOWN
SOME RELUCTANCE TO PUT ANSWER ON PIECE OF PAPER LEST
IT APPEAR THEREBY TO BE GIVEN EXTRA FORMALITY OR
IMPORTANCE. WE AND BRITISH BELIEVE THAT IF WE ULTIMATELY
RESPOND ALONG RECOMMENDED LINES, A "NON-PAPER" OF
SORT WHICH IS FREQUENTLY USED BY BOTH SIDES IN
KHOTULEV-POLAD CHANNEL WOULD BE USEFUL BOTH AS A
COURTESY TO SOVIETS AND AS A DEVICE TO ENSURE THAT
SOVIETS UNDERSTAND AND REPORT ACCURATELY WHAT WE SAY. GEORGE

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Message Attributes

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